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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
1998 Biennial Regulatory Review --) MM Docket No. 98-43
Streamlining of Mass Media Applications,)
Rules, and Processes)

TO: The Commission

PETITION FOR PARTIAL RECONSIDERATION

Reece Associates Limited ("Reece"), the permittee of television broadcast station WRDQ, Orlando, Florida, by its attorneys and pursuant to Section 1.429 of the Commission's rules, hereby requests that the Commission reconsider its Report and Order in the above-referenced rulemaking proceeding (FCC 98-281, released November 25, 1998 ("*Streamlining Order*")) with respect to the policies and rules adopted therein concerning construction permit extension procedures.¹

Reece respectfully requests that the Commission continue to use the procedures set forth in Section 73.3534 of its rules to perform an individualized review of requests for extensions filed by permittees whose permits have been extended and who have had at least three years to construct their stations.

Currently, under section 73.3598 of the Commission's rules, a permittee is given 24 months to construct a new full-power television station or to modify the facilities of a licensed television station. If a permittee is unable to complete construction of the new station or modified facilities

¹ *Streamlining Order* at ¶¶ 77-90.

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within the initial 24-month period, it may request an extension of time to complete construction.² The Commission will grant an extension application if the permittee can demonstrate that it meets one of the following three criteria: (1) construction is complete and testing is underway looking toward prompt filing of a license application; (2) substantial progress has been made; or (3) no progress has been made for reasons clearly beyond the control of the permittee but the permittee has taken all possible steps to resolve expeditiously the problem and proceed with construction.³ If the Commission grants the extension application, the permit in question will be extended for six months.⁴

The Commission now has revised its rules, as part of its biennial regulatory review, with respect to the time a permittee has to complete construction of a broadcast station, extending the initial construction period for all permits to three years.⁵ The Commission also eliminated Section 73.3534 of its rules and the permit extension procedures provided thereunder. Under the new rules, if a permittee does not complete construction of its station within this three-year period its permit is subject to automatic forfeiture without further Commission action.⁶ Pursuant to the new rules, the three-year construction period will be tolled only in the event that an act of God has slowed construction or the permit or construction is subject to administrative or judicial review.⁷

² 47 C.F.R. 73.3534 (1997).

³ 47 C.F. R. 73.3534(b).

⁴ 47 C.F.R. 73. 3534(e).

⁵ *Streamlining Order* at ¶ 83.

⁶ *Id.* at ¶ 89.

⁷ *Id.* at ¶ 84.

The new three-year construction rule applies to newly-issued construction permits and to existing outstanding construction permits.⁸ Existing permittees who are currently authorized to construct under an extension are eligible for a three-year construction period, including any additional time based on the tolling procedures, upon written request to the Commission.⁹ However, the Commission stated that “*no additional time will be granted when the permittee has had, in all, at least three unencumbered years to construct The construction permit will be subject to automatic forfeiture at the expiration of its last extension.*”¹⁰

Although the Commission stated in the *Streamlining Order* that once a permittee has had three years to construct its station its permit will be forfeited automatically at the expiration of its last extension, it is unclear whether the Commission intends to apply this new rule to those permittees who are constructing their stations under extensions and whose extended construction periods already have exceeded three years. Many of these permittees have diligently attempted to construct their stations and have received extensions of time to construct pursuant to appropriate “one-in-three” showings. A strict application of this new automatic forfeiture provision to this class of permittees may lead to an unjust result for the entire class. Accordingly, Reece requests that the Commission reconsider its decision with regard to construction permits for which extensions were granted pursuant to Section 73.3534(b) prior to the adoption of the *Streamlining Order*, and especially in cases where the permittee already has had three years to construct its station. Reece

⁸ *Id.* at ¶ 89.

⁹ *Id.*

¹⁰ *Id.* (emphasis added).

urges that the Commission continue to conduct individualized reviews of the applicable facts and circumstances surrounding such permits.¹¹ An individualized review, pursuant to Section 73.3534, for this limited class of permittees is justified for reasons of fairness, is in the public interest and will not unduly undermine the new rule.

The Commission should reconsider its application of its new rule to permittees such as Reece for reasons of essential fairness. Reece and similarly-situated permittees had no notice that the Commission would promulgate rules providing such a harsh and drastic change in its procedures. In the Notice of Proposed Rule Making wherein the Commission proposed its new three-year construction rule, the Commission stated that it believed “it would be administratively unworkable to apply the proposed rules to construction permits that are already beyond their initial construction periods . . . [b]ecause many of these permits have already been afforded a construction period close

¹¹ Reece is in this class of permittees who are constructing their stations pursuant to extensions of their original permits and who have had at least three years to construct their stations. Reece was granted a construction permit for a new station on Channel 27 at Orlando, Florida through the comparative hearings process. The grant was subject to judicial challenge; the Court of Appeals rendering a decision in January 1992. *See Marlin Broadcasting of Central Florida, Inc. v. FCC*, 952 F.2d 507 (D.C. Cir. 1992). Reece has made substantial progress toward construction of the station but has not yet completed construction due to circumstances beyond Reece’s control and has had its permit extended under the Commission’s current rules. *See* FCC File Nos. BMPCT-950428KJ, BMPCT-951025KO and BMPCT-950612KG.

Reece’s current extension expired on January 10, 1999. On December 10, 1998, Reece submitted a request for extension of its permit wherein Reece demonstrated substantial progress toward construction. *See* FCC File No. BMPCT-981210LA. However, Reece currently is aware of circumstances which will prevent it from completing construction within the six-month extension period provided by Section 73.3534(e), should such extension be granted. Accordingly, Reece also requested a waiver of Section 73.3534(e) so that it may receive a 12-month extension of time to complete construction of WRDQ. However, should the extension request be granted only for six months, a strict reading of the new rule will require Reece to forfeit its permit despite its good-faith efforts and significant progress towards construction of WRDQ. Therefore, Reece is submitting this Petition for Partial Reconsideration of the *Streamlining Order*.

to (or, in many instances, in excess of) the three-year term.”¹² Therefore, the Commission in the *Streamlining NPRM* proposed to continue to apply Section 73.3534(b) and its procedures for extension of construction periods “to permits outside their initial periods.”¹³ However, in the *Streamlining Order*, the Commission implemented an entirely different rule than that which it proposed in the *Streamlining NPRM*, without notice to Reece and other similarly-situated permittees. Had Reece been aware that the Commission was considering a rule that would literally force it to complete construction within its current extension period (whether feasible or not) or forfeit its permit, Reece assuredly would have filed comments in opposition to such a rule.¹⁴ Implementation of the new rule without giving permittees such as Reece an opportunity to comment on the rule violates the basic tenets of fairness, especially in light of the Commission’s initial proposal to continue applying its existing rules to permittees who have been granted extensions. Therefore, Reece requests that the Commission reconsider its decision to apply the new rule to Reece and similarly-situated permittees.

In addition, allowing this limited class of permittees to continue to request additional time to complete construction under the current rules is consistent with the public interest and will not

¹² *Notice of Proposed Rule Making, In the Matter of 1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules and Processes*, MM Docket No. 98-43, at ¶ 68 (released April 3, 1998) (“*Streamlining NPRM*”).

¹³ *Id.*

¹⁴ The only comments the Commission received which addressed permittees at or near the expiration of their permit or extension did not support the action which the Commission took in its *Streamlining Order*. See *Comments of Independent Broadcast Consultants, Inc.* at 20 (recommending that such permittees should be given a one-year, one-time grace period to complete construction).

undermine the new rule; the alternative is automatic cancellation of these permits no matter how close these stations are to going on the air.

If these permits are automatically canceled, any re-licensing of the stations would come under an auctions scheme; the most optimistic estimate for the timing of the first broadcast station auction is the later part of 1999. After the completion of an auction, the high bidder for the station's license will be given the opportunity to file a "long-form" application for the station, wherein detailed information concerning licensee qualification and engineering and technical proposals for the station will be disclosed for the first time. Only after satisfactory Commission review of the high bidder's long-form application (and resolution of any petitions to deny such applications) will a construction permit be granted (for a three-year term). Given this lengthy process, a new permittee authorized under the auctions procedure would take considerably more time to bring a new station into operation; whereas, many construction permittees have made or are making significant progress toward completion of their stations and will be on the air providing service prior to an auction for the same allotment.

Furthermore, reconsideration of the new rule to allow these specific permittees to continue to utilize the current rule will not serve as a source for erosion of the new rule and will not harm the public interest because the number of permittees who fall into this category is finite. Finally, reconsidering the strict application of the new rule to permittees such as Reece will not unduly burden (and may actually preserve) Commission resources. As the Commission is well aware, its rules are frequently subject to requests for waiver. As the Court of Appeals for the District of Columbia Circuit has stated, "sound administrative procedure contemplates waivers, or exceptions, granted only pursuant to a relevant standard . . . best expressed in a rule that obviates discriminatory

approaches.”¹⁵ For permittees such as Reece, the Commission has such a rule now.

If the Commission does not reconsider this harsh application of the new rule to Reece’s particular class of permittees, such permittees will be forced to seek waivers of the rule based on their unique facts and circumstances under a currently undefined approach. The Commission then will have to determine under what standard it will grant such waivers. Thus, under the new rule, the Commission will be reviewing requests for waivers rather than the current requests for extensions. Accordingly, granting individual review to and extension of permits such as Reece’s under the current rule is in the public interest.

Reece also seeks reconsideration of the Commission’s decision to specifically exclude delays caused by zoning difficulties as a basis for tolling a permittee’s construction period under the new three-year rule.¹⁶ In its *Streamlining Order*, the Commission concluded that the new three-year construction period “provides ample time” to complete the zoning application and approval process and construct the station or “to choose a new site free from zoning difficulties” and construct the station at the new site.¹⁷ The Commission concluded that limiting the tolling procedures in this manner is consistent with the statutory requirement that the Commission provide permittees with additional time to construct a broadcast station in the event that delays are caused by circumstances

¹⁵ *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

¹⁶ Tolling will be permitted only when construction is “encumbered due to an act of God, or when a construction permit is the subject of administrative or judicial review.” *Streamlining Order* at ¶ 84. Falling into the category of “administrative or judicial review” are: (1) petitions for reconsideration and applications for review, pending before the Commission, of the grant or extension of a construction permit; and (2) “any cause of action pending before any court of competent jurisdiction relating to any necessary local state or federal requirement for the construction or operation of the station, including any environmental requirement.” *Id.* at ¶ 86.

¹⁷ *Id.*

not under the control of the permittee.¹⁸ Reece respectfully disagrees.

In applying section 73.3534, the Commission consistently has recognized zoning delays as a circumstance beyond a permittee's control in granting additional time to construct broadcast stations. Concluding that a three-year period is a sufficient amount of time to obtain zoning approval and construct a station in every circumstance fails to recognize the real, and in some regions of the country, the likely possibility that the zoning approval process will be subject to local opposition, which can be a source of significant delay.¹⁹ Administrative back-logs with local zoning authorities also have caused considerable delays in obtaining the required approvals before a permittee can commence construction. In both examples, the delays in the zoning approval process are beyond the permittee's control and can persist for periods well into and even beyond a term of three years. Consistent with Section 319(b) of the Communications Act, such circumstances should, upon proper request by permittees, serve as an acceptable basis for tolling the subject station's construction period.

Therefore, Reece urges the Commission to reconsider its decision to exclude zoning delays as a basis for tolling a permittee's construction period and permit tolling in those cases where permittees can demonstrate that an application for zoning approval was timely filed and that delays in the approval process were caused by circumstances beyond the permittee's control.

WHEREFORE, based upon the foregoing, Reece Associates Limited hereby requests that the Commission reconsider its decision to automatically forfeit the construction permit of a permittee

¹⁸ *Id.* The statutory requirement is embodied in Section 319(b) of the Communications Act of 1934, as amended.

¹⁹ As often is the case, parties oppose applications for zoning approval for broadcast tower construction for environmental reasons, which the Commission cites elsewhere in the *Streamlining Order* as a sufficient basis for tolling a permittee's construction period. *See Streamlining Order* at ¶ 86.

who is currently constructing a station under an extended permit and who already has had more than three years to construct its station and to specifically exclude delays caused by zoning difficulties as a basis for tolling a permittee's construction period under the new three-year construction rule.

Respectfully submitted,

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